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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 582

THE CALIFORNIA OREGON POWER COMPANY, A CALIFORNIA CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (IV R. 1245) is reported in 150 F. 2d 25. The opinion and order of the Federal Power Commission (I R. 23–38) are reported in 3 F. P. C. 368, 47 P. U. R. (N. S.) 193.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 15, 1945 (IV R. 1245–1250). Rehearing was denied on August 6, 1945 (IV R.

1251). The petition for a writ of certiorari was filed on November 5, 1945. The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act (49 Stat. 860, 16 U. S. C. 825l), and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission[1] properly required that an amount of $636,237.23 in petitioner's plant accounts, which it found to represent profits paid to an affiliated service company, be classified as a "write-up" and eliminated by a charge to surplus.

2. Whether the Commission properly required that an amount of $828,684.97 in petitioner's plant accounts, representing the cost of acquisition of admitted intangibles which the Commission found to be "nuisance value, going value, franchise value, monopoly value, and other similar intangibles", be amortized by annual charges to income over a ten-year period.

3. Whether the petitioner was accorded a fair hearing.

STATUTE INVOLVED

The relevant provisions of the Federal Power Act (June 10, 1920, c. 285, 41 Stat. 1063, amended August 26, 1935, c. 687, 49 Stat. 838, 16 U. S. C.

[1] The respondent, Federal Power Commission, is sometimes referred to herein as "Commission" and the petitioner, The California Oregon Power Company, as "Copco."

791a–825r) are set forth in the Appendix, *infra*, pp. 26–35.

STATEMENT

Petitioner is, admittedly, a "public utility" within the meaning of the Federal Power Act and subject to its provisions, by reason of its ownership and operation of facilities for the transmission and sale at wholesale of electric energy in interstate commerce (I R. 25–26, 106–107, III R. 911–914). On December 29, 1939, it filed with the Commission a proposed reclassification of its electric plant accounts pursuant to the Commission's Uniform System of Accounts,[2] and on March 21, 1941, filed a revised reclassification (I R. 23–24; III R. 797).

After a joint audit by the staffs of the Federal Power Commission, the Public Utilities Commissioner of Oregon, and the Railroad Commission of California, a joint staff report (Ex. 5, III R.

[2] The validity of this system of accounts was sustained by this Court in *Northwestern Electric Company, et al.* v. *Federal Power Commission*, 321 U. S. 119, 122–123. Its preparation and promulgation was the result of close cooperation with a committee of the National Association of Railroad and Utilities Commissioners (NARUC) and other State and Federal agencies, and a consideration of views and criticisms of State commissions and representatives of electric utilities. Federal Power Commission, *Sixteenth Annual Report to Congress* (1936), pp. 9, 10, 11. Out of 42 regulatory commissions having jurisdiction over electric companies, 36 have prescribed the Federal Power Commission's system or the substantially identical NARUC system, and six, modifications of the two systems. *Moody's Public Utilities* (1945), p. a48.

908–960) was prepared and served on petitioner.[3] The staff took the position that, in addition to making the adjustments reflected in petitioner's revised reclassification, petitioner should transfer from its electric plant accounts to Account 107, Electric Plant Adjustments,[4] capitalized profits paid to the affiliated Byllesby Engineering and Management Corporation.[5] The staff also took the position that petitioner should submit a plan for the disposition of such profits, and a "plan of disposition" of the amounts it had classified in Account 100.5, Electric Plant Acquisition Adjustments,[6] "consistent with the facts and circum-

[3] The Oregon Commissioner and the California Commission have prescribed substantially the same system of accounts as the Federal Power Commission. Section 301 (a) of the Federal Power Act expressly provides that "nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."

[4] The text of Account 107 provides that "Write-ups of electric plant prior to the effective date of this system of accounts shall be recorded herein" and "shall be disposed of as the Commission may approve or direct." 18 CFR 101.107.

[5] Byllesby Engineering and Management Corporation is sometimes referred to as "Byllesby."

[6] The text of Account 100.5 provides that the difference between "the cost to the accounting utility of electric plant acquired as an operating unit or system" and the "original cost" (cost to the person first devoting to public service) is to be classified therein "according to the character of the amounts" and "shall be depreciated, amortized, or otherwise disposed of, as the Commission may approve or direct." 18 CFR 101.100:5.

stances under which the amounts were established in the account" (Ex. 46, III R. 841–843, 954). Upon petitioner's failure to do so (III R. 844–846), the Commission, on July 15, 1945, set the matter for hearing on August 11, 1941 (I R. 1–5), but the hearing was delayed by reason of numerous postponements granted by the Commission at the request of the petitioner (I R. 11–15, 25).

The hearing was held in San Francisco from February 26 to March 4, 1942 (I R. 25).[1] Just before its conclusion, petitioner made an oral motion for a continuance (III R. 1177–1180), and, shortly thereafter, filed a petition for further hearing with the Commission (I R. 16–20). The trial examiner (III R. 1179) and the Commission (I R. 21–22) denied these requests for further time.

The Commission, on February 3, 1943, entered its opinion (I R. 23–36) and order (I R. 36–38). It found that the amount of $636,237.23, which had been classified by petitioner in Account 100.1, Electric Plant in Service, represented the profit portion of payments Copco had made to Byllesby under a contract which was not at arm's length (I R. 32, 164–170) and was between two companies under the common control of Standard Gas

[1] The Oregon Commissioner was granted leave to intervene in the hearing (I R. 10) and he presided jointly with the Trial Examiner of the Federal Power Commission (I R. 103). The California Commission did not intervene but it had an observer present (I R. 104).

and Electric Company,[8] and that no part thereof represented actual cost to Byllesby of any services rendered to Copco. It ordered that the amount be reclassified in Account 107, Electric Plant Adjustments, as a "write-up" (I R. 31–33) and disposed of (paragraphs (2) and (7), I R. 38) in the manner petitioner had proposed for the disposition of amounts "properly" classified in Account 107, viz., by a charge to capital surplus if created for that purpose, otherwise to earned surplus (I R. 118–119).

The Commission found from the evidence, including letters and reports contemporaneous with the acquisition of operating properties, that the amount of $828,684.97, classified by petitioner in Account 100.5 as excess of acquisition cost over original cost, represented "payments for nuisance value, going value, franchise value, monopoly value and other similar intangibles" (I R. 27–29). Upon the basis of expert accounting testimony it further found that such intangibles "represent basically a capitalization of" potential earning power, that "their ephemeral nature" requires that "although they may properly be established in the plant accounts at the outset they should then be removed quickly therefrom," and that

[8] The contract was made and payments rendered while Byllesby was a 100% subsidiary of Standard Gas and Electric Company which owned all of Copco's common and some of its preferred stock (III R. 801, 820–821; I R. 164–179; III R. 1067, 1070, 1172).

"rapid amortization of the cost of intangibles is sound and prudent accounting." Having so found, the Commission ordered that the amount of $828,684.97 be amortized by charges to Account 537, Miscellaneous Amortization, an income account, and, in the light of expert testimony in the record, it fixed the period for such amortization at ten years (paragraph (1), I R. 36–37). In doing so it referred to the fact that most (over 90%)[9] of the amount had already been retained in the plant account for some thirty years without amortization. (I R. 30–31.)

On proceedings, under Section 313 (b) of the Federal Power Act, to review the order of the Commission in these respects, the Circuit Court of Appeals for the Ninth Circuit affirmed the challenged portions of the order (IV R. 1245–1250), denied petitioner's motion for leave to adduce additional evidence (IV R. 1249–1250), and denied a petition for rehearing (IV R. 1251).

ARGUMENT

1. In asking this Court to bring up for review the lower court's affirmance of paragraphs (2) and (7) of the Commission's order (I R. 37–38), which required a transfer from plant accounts to Account 107, and charge to surplus, of the $636,237.23 found to be a "write-up", petitioner seeks to reopen a question settled by an unbroken

[9] III R. 808–812, 875–877, 929. Another 9% had been carried for some 20 years without amortization (III R. 933; 810, 878–889).

line of court decisions upholding the Commission's consistent[10] exclusion of profits to affiliates from plant accounts. *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 606–608; *Alabama Power Company* v. *McNinch, et al.*, 94 F. 2d 601, 616–618 (App. D. C.); *Alabama Power Company* v. *Federal Power Commission*, 134 F. 2d 602, 609 (C. C. A. 5); *Puget Sound Power & Light Company* v. *Federal Power Com-*

[10] *Alabama Power Co., Licensee*, 1 F. P. C. 25, 31, P. U. R. 1932 D 345, 352; *Chelan Electric Co., Licensee*, 1 F. P. C. 102, 108, P. U. R. 1933 E, 332, 337; *Louisville Hydro-Electric Co., Licensee*, 1 F. P. C. 130, 136, 1 P. U. R. (N. S.) 454, 461; *Safe Harbor Water Power Corp., Licensee*, 1 F. P. C. 230, 237; *Clarion River Power Co., Licensee*, 1 F. P. C. 269, 281; *Northern States Power Co., Licensee*, 1 F. P. C. 329, 344; *Safe Harbor Water Power Corp., Licensee*, 1 F. P. C. 367, 371; *Florida Power Corp., Licensee*, 1 F. P. C. 390, 399; *Lexington Water Power Co., Licensee*, 1 F. P. C. 430, 469, 473; *Alabama Power Company, Licensee*, 2 F. P. C. 312, 37 P. U. R. (N. S.) 35; *Alabama Power Company, Licensee*, 2 F. P. C. 432, 41 P. U. R. (N. S.) 449; *Alabama Power Company, Licensee*, 2 F. P. C. 479, 43 P. U. R. (N. S.) 37; *St. Croix Falls Minnesota Improvement Co., et al.*, 3 F. P. C. 13, 43 P. U. R. (N. S.) 1; *Pennsylvania Power & Light Co., Licensee*, 3 F. P. C. 89, 44 P. U. R. (N. S.) 344; *Niagara Falls Power Co., Licensee*, 3 F. P. C. 206, 44 P. U. R. (N. S.) 291; *Puget Sound Power & Light Company, Licensee*, 3 F. P. C. 231, 45 P. U. R. (N. S.) 237; *Niagara Falls Power Co., Licensee*, 3 F. P. C. 249, 45 P. U. R. (N. S.) 129; *Superior Water, Light & Power Co.*, 3 F. P. C. 254, 45 P. U. R. (N. S.) 358; *Pacific Power & Light Co.*, 3 F. P. C. 329, 46 P. U. R. (N. S.) 131; *Minnesota Power & Light Co.*, 3 F. P. C. 388, 48 P. U. R. (N. S.) 1; *Indiana Hydro-Electric Power Co.*, 3 F. P. C. 510, 51 P. U. R. (N. S.) 55; *Mississippi Power & Light Co.*, 3 F. P. C. 521, 51 P. U. R. (N. S.) 157; *Utah Power & Light Co.*, 3 F. P. C. 532, 53

mission, 137 F. 2d 701, 703 (App. D. C.); *Niagara Falls Power Company* v. *Federal Power Commission,* 137 F. 2d 787 (C. C. A. 2), certiorari denied, 320 U. S. 792; *Pennsylvania Power & Light Company* v. *Federal Power Commission,* 139 F. 2d 445, 450 (C. C. A. 3), certiorari denied, 321 U. S. 798; see also *Pacific Power & Light Company* v. *Federal Power Commission,* 141 F. 2d 602 (C. C. A. 9).[11] As this Court pointed out in the

P. U. R. (N. S.) 164; *Utah Light and Traction Co.*, Op. No. 108, decided November 23, 1943. Three of the foregoing decisions involve the elimination of the profit portion of Byllesby fees similar to those in the case at bar from the plant accounts of other subsidiaries of Standard Gas and Electric Company. In each case, the Commission's decision in this respect was accepted without seeking a review in the courts. *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F. 2d 126, 129 (C. C. A. 6), certiorari denied, 318 U. S. 761; *Northern States Power Co.* v. *Federal Power Commission,* 118 F. 2d 141, 143 (C. C. A. 7); *St. Croix Falls Minnesota Improvement Co.*, 3 F. P. C. 13, 43, P. U. R. (N. S.) 1.

[11] In *United States, et al.* v. *New York Telephone Company* (No. 55, this Term), currently awaiting decision, the lower court's opinion (56 F. Supp. 932–938), relied on by petitioner (Pet. Br. 38–41) but announced before the decision of this Court in *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra,* distinguishes the cases cited in the text on the basis of a difference between the respective systems of accounts by reason of the administrative construction filed by the Communications Commission in *American Telephone & Telegraph Company* v. *United States,* 299 U. S. 232, 241. Moreover, the present case, unlike the *New York Telephone Co.* case, does not involve a question as to the adequacy of the depreciation reserve to absorb affiliated company profits theretofore charged to the reserve, and, in oral argument, Telephone Company counsel conceded that the portion of

Colorado Interstate Gas Co. case (324 U. S. 581, 607–608), the end result of a transfer from one subsidiary of a holding company to another at an inter-company profit is a write-up or inflation of assets, and it was the prevalence of just such practices that gave rise to an insistent demand for the Federal Power Act.

Not merely ascertainment and classification of write-ups, but their complete elimination from the public utility's books is authorized by that Act, and is constitutional. *Northwestern Electric Company* v. *Federal Power Commission,* 321 U. S. 119, 123; *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U. S. 581, 606–608.

In the *Northwestern Electric Company* case it was contended, as it is here (Pet. Br. 22 *et seq.,* 43 *et seq.*), that the Commission's power over the company's accounts is exhausted when it has ascertained the existence of write-ups and caused them to be segregated and classified as such, and that an order of the Commission for their disposition "goes beyond the Commission's statutory

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affiliated company profits associated with properties still carried in the plant accounts would be "subject to revision." See also Appellee's Brief, No. 55, this Term, pp. 15, 31. If there is a valid distinction between the Power Commission cases cited in the text and the *New York Telephone Co.* case, no decision in the latter case is pertinent here, and in any event, the cases cited in the text are controlling.

mandate [and] constitutional limitations" (321 U. S. at p. 123). The contention was unanimously overruled. The Court, noting that a mere write-up cannot properly appear in any account "on the asset side of the" ledger and that "the Commission's form of accounting does not permit the carrying of any such item in the asset account since its system is a cost system of accounting" (p. 123), upheld the disposition there ordered, as "sustained by expert evidence" (p. 124). The decision has been considered, rightly, as settling any question as to the Commission's authority to require write-ups to be charged off to income or surplus. See *Pacific Power & Light Company* v. *Federal Power Commission*, 141 F. 2d 602 (C. C. A. 9).

The decision in the *Colorado Interstate Gas Co.* case [12] set at rest any possible doubt when it upheld an order fixing rates on a base from which over $3,000,000 of affiliated company profits had been eliminated by the Commission. If, as there held, the elimination of such write-ups from the rate base does not violate due process, then clearly the requirement that such write-ups be eliminated from a company's accounts cannot

[12] Other decisions upholding rates fixed by the Commission through utilization of cost figures derived under its system of accounts are *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, and *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, 324 U. S. 635, 649.

be unconstitutional. They are but a "fictitious or paper increment" in the capital accounts which the opinion in the *American Telephone & Telegraph Co.* case (299 U. S. 232, 240) recognized could be required to be written off.[13]

Petitioner's further contentions, that a requirement that a write-up be eliminated by a charge to surplus is beyond the Commission's jurisdictional powers as an invasion of the fields of state regulation (Pet. Br. 78–80)[14] and managerial functions (Pet. Br. 81–84), are the same contentions as were said by this Court to be "without merit" in the *Northwestern Electric Company* case (321 U. S. 119, 124).

The findings required under the well settled principles of those decisions—affiliation, profit, and the appropriate accounting treatment of the $636,237.23—are clearly set forth in the Commis-

[13] The Court construed the accounting provision there held valid as providing that "* * * such amount will be written off as appears, upon an application for appropriate directions, to be a fictitious or paper increment" (299 U. S. at p. 240).

[14] Petitioner's reliance (Pet. Br. 72–73) upon the language of the last clause of Section 201 (a) of the Act ("* * * such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States") was disposed of when this Court held that "this limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production and distribution." *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 74.

sion's opinion (I R. 31–33, 35) and are amply supported by the evidence.[15]

As to Byllesby being an affiliate of Copco, in addition to the evidence of common control to which reference has already been made (*supra*, pp. 5–6), counsel for Copco stipulated that Copco and Byllesby were so closely affiliated "that, for all intents and purposes, [they are] one corporation" (III R. 1055–1056, and Ex. 49, III R. 1057–1058).

As to the amount in question being profit to Byllesby, petitioner makes no complaint of lack of support for the Commission's finding (I R. 32–33) that $636,237.23 represents profits paid to Byllesby. Nor would any such complaint be availing, if sought to be advanced. Of the $636,-237.23, approximately two-thirds ($416,896.62[16]) represented payment by Copco of a 7½% fee under a contract for engineering services (I R. 164–170), on construction work which Copco did for itself.[17] An additional $188,942.14 represented

[15] Section 313 (b) of the Federal Power Act expressly provides that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Jersey Central Power & Light Company* v. *Federal Power Commission*, 319 U. S. 61, 67.

[16] A total of $442,938.95 in fees was charged on "Local Work Orders", and of this amount, $26,042.31 had been previously retired, leaving a balance of $416,896.62 (III R. 799).

[17] Thus, Byllesby received a 7½% engineering fee on petitioner's purchase of a horse (II R. 496), installation of

the profit portion of Byllesby's 7½% fees for work performed by Byllesby under the same contract (III R. 798, 806), while $15,544.85 represented profits on legal fees paid by Copco to Byllesby's legal department (III R. 799) and was conceded by petitioner properly to have been classified as a write-up in Account 107 (I R. 397).[18]

As to the proper accounting treatment of such affiliated company profits, expert accounting witnesses for the Commission, whose qualifications were unquestioned (III R. 790–793; 963–965), testified that they were not "cost" within the meaning of that term as used in the System of Accounts, but should be classified in Account 107 as "write-ups" (III R. 800–802; 966–967; 1099, 1102–1117; 1141–1147, 1166) and charged to earned surplus unless a capital surplus is created to which the amount can be charged (III R. 817, 971–972). That was the disposition proposed by petitioner for amounts "properly" reclassified in Account 107 (I R. 118–119, II R. 619–626).

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glass windows in the office of petitioner's district manager (II R. 485–488), installation of a wood furnace in the house, occupied by petitioner's district manager (II R. 489–490), installation of screens on doors and windows in the office of petitioner's superintendent (II R. 490–491), payment of a sewer assessment (II R. 492–493), and construction of a substation fence (II R. 499).

[18] The remaining $14,853.62 represented capitalized interest during construction applicable to Byllesby profits (III R. 799–800, 1186).

2. The lower court's affirmance of paragraph (1) of the Commission's order, which directed amortization of the amount of $828,684.97 (I R. 36) classified by petitioner in Account 100.5 and admittedly representing payment for intangibles, is also in accord with the applicable decisions. *Northwestern Electric Company* v. *Federal Power Commission,* 321 U. S. 119; *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232; *Pacific Power & Light Company, et al.* v. *Federal Power Commission,* 141 F. 2d 602 (C. C. A. 9).

The question sought to be reviewed in this connection, like that considered in the *Northwestern Electric Company* case (321 U. S. 119, 123), is one of proper accounting, namely, whether amounts paid in arm's-length transactions for intangibles should be permitted to remain in petitioner's plant accounts indefinitely, as it contends (Pet. Br. 24), or gradually eliminated, as directed by the Commission, through an accounting treatment which parallels (III R. 1034) depreciation accounting for tangible physical structures.[19] The Commission's opinion makes it clear that the character of the items making up the amount of $828,684.97 and not the mere fact that they are excesses over original cost, as petitioner assumes

[19] "The label is unimportant, whether depreciation or amortization * * *." *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, at p. 244.

(*e. g.*, Pet. and Br., 8, 22, 47–48), is the basis of its order (I R. 29–31).

That the Commission's action was a permissible accounting regulation under statutory provisions similar to those of the Federal Power Act and within applicable constitutional limitations, is clear from a consideration of the *American Telephone & Telegraph Co.* case, *supra,* in the light of subsequent decisions. There the Court recognized that there might be objection to an inflexible accounting provision of general applicability, like that involved in *New York Edison Co.* v. *Maltbie* (244 App. Div. 685; *id.*, 271 N. Y. 103), which made it mandatory that all amounts classified in the adjustment account be written off out of surplus. But the Court upheld the provisions for the adjustment account in the Communications Commission's system of accounts because those provisions were construed as not prescribing final accounting treatment of items classified therein until the character of the particular items should be determined. The opinion indicates the kinds of further accounting treatment which the Court contemplated the Commission might require, and it is one of these which the present case presents.

Here the Power Commission's order for amortization, by charges to income, of the $828,684.97 reclassified by petitioner in the acquisition adjustment accounts, specifies one of the methods of disposition referred to in the expert testimony,

upon which the Court relied in that case, the amount to be "disposed of, after the character of the item[s has] been determined, in a manner consistent with the general rules underlying the uniform system of accounts for the distribution of expenditures, according to their character, to * * * income * * *" (299 U. S. at pp. 240–241).

Furthermore, the administrative construction submitted by counsel for the Communications Commission and accepted by the Court provided that "after a fair consideration of all the circumstances" provision would be made for amortization of assets which it referred to as the kind that "cease to exist or are retired" (*i. e.*, assets that are not permanent as is land, for example).[20]

[20] "Amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets *cease to exist or are retired;* and, in accordance with paragraph (C) of account 100.4, *provision will be made for their amortization*" (299 U. S. at p. 241, emphasis supplied). The references to "value" in the A. T. & T. opinion are, of course, to be read in the light of the Court's subsequent approval of a purely cost system of accounts (*Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119, 123) and of the approach to regulation of rates on a "cost" basis. *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635.

Again, referring to the objection that the ultimate disposition of an item classified in the adjustment account would be "uncertain until the Commission has given particular directions with reference thereto," the opinion says the item is "subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment," with its ultimate disposition dependent "upon evidentiary circumstances, difficult to define or catalogue in advance of the event" (299 U. S. at p. 242).

Thus, the A. T. & T. opinion makes the determination of the "character of the item," the "fair consideration of all the circumstances," and the "evidentiary circumstances difficult to define or catalogue in advance of the event" the criteria by which the disposition of a particular item is to be determined. In the present case, therefore, "the decisive inquiry is whether the Commission's order has substantial support in the record." *Pacific Power & Light Company* v. *Federal Power Commission*, 141 F. 2d 602, 604 (C. C. A. 9).

There is such support in this record. In fact, petitioner does not appear to contest the finding that the $828,684.97 represents intangibles, but merely asserts, without evidentiary support in the record, that the intangibles are of a somewhat different nature than found by the Commission (I R. 27–28; Pet. Br. 37–38). The major portion of the $828,684.97 classified in Account

100.5 as "nuisance value, going value, franchise value, monopoly value, and other similar intangibles" consists of the $614,429.66 excess over original cost which petitioner's predecessor, Siskiyou Electric Power & Light Company, paid to acquire the electric operating properties of the so-called "Ray interests" in 1911 (III R. 927–929, 809, 811–812, 875–877). As correspondence from the company's files introduced in evidence shows, the purpose of this purchase was to end competition which was developing between the parties at the time of the purchase. The Siskiyou Company had set aside a fund for the construction of an electric "line into the territory" of the other company (Ex. 24, III R. 875–876). Although the amount paid represented "an exceptionally high price" of $333 per horsepower, although the Siskiyou Company had "an abundance of power" available at a cost of $30 per horsepower for use "in competition," and although the power plant purchased was "in very bad condition" and "nothing had ever been set aside for depreciation", the "top notch price" was paid for the Ray properties and the threat of competition eliminated (III R. 876–877).

The evidence is equally clear that petitioner's payment of $71,120.63 in excess of original cost for the electric properties of Douglas County Light and Water Company in 1923 also represented payment for "intangibles." Two months

prior to this purchase, petitioner's Vice President and General Manager wrote to its President that he feared that petitioner would "be forced to pay an amount considerably in excess of the present day physical value of the system itself—in other words, the whole question as to whether or not we should purchase these properties will hinge upon the value that we wish to place upon the intangibles, including the *value of the strategic position,* the possibilities of the territory, etc." (Ex. 25, III R. 878, emphasis supplied).

The expert accounting witnesses for the Commission testified that the life of intangible assets such as those here involved (an elimination of a threat of competition, and acquisition of a "strategic position," etc.) is questionable and uncertain, but in any event not permanent, and that provision for the retirement of such intangibles is sound accounting and practiced by both commercial enterprises and public utilities. They testified that, in the light of the length of time these intangibles already had been on the books without provision for disposition thereof, amortization of the amounts by charges to Account 537, Miscellaneous Amortization, an income account, over the next ten-year period, was a satisfactory and practicable accounting disposition. (III R. 812–813, 968–970.)

Moreover, as petitioner admits, it had the burden of proof under Section 301(a) of the Act

(Pet. Br. 19)[21] and it failed and refused to submit any plan for disposition of the $828,684.97 (I R. 110, 121). Having failed to propose any "possible alternative * * * although the opportunity to do so has been long open," petitioner is not in a position to object to the corrective accounting prescribed by the Commission.[22]

Furthermore, as stated in the Commission's opinion (I R. 30), all the expert accounting witnesses, including those of petitioner, were "in agreement that rapid amortization of the cost of intangibles is sound and prudent accounting." Petitioner's accounting witness, Lewis Lilly, testified that he assumed, and he had "never seen it questioned," that a regulatory body "has the authority to require, as a matter of course, the amortization of" intangibles by a public utility (II R. 596). Petitioner's expert accounting witness, William A. Paton, testified that he did not "see anything unsound about a reasonable program of amortization" of intangibles (II R. 444) and in *The Accountants' Handbook, Third Edition* (1943), of which he was editor, it is clearly recognized that it is in accordance with correct

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[21] As held in *Northwestern Electric Company* v. *Federal Power Commission*, 134 F. 2d 740, 743 (C. C. A. 9), Section 301(a) of the Act imposes upon the utility whose accounting entries are in question, the "burden of going forward" with "substantial evidence" to "justify" such entries.

[22] *Alabama Power Company* v. *Federal Power Commission*, 128 F. 2d 280, 295–296 (App. D. C.), certiorari denied, 317 U. S. 652.

principles of accounting to amortize the cost of intangibles (pp. 850–851).[23] See also Sherwood and Hornberger, *Fundamentals of Auditing* (1933), p. 146; Kester, *Principles of Accounting* (1939), p. 573.

Since the amortization requirement of the Commission's order was, therefore, clearly not "so entirely at odds with fundamental principles of correct accounting"[24] nor so "arbitrary"[25] "and outrageous"[26] as to be the "expression of a whim rather than an exercise of judgment," it was properly affirmed by the court below which was not "at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers"[27] and for whose judgment there was "warrant in the record."[28]

3. Petitioner sought a continuance and reopening of the hearing to enable it to obtain evidence

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[23] While the Handbook speaks of "good will", that intangible includes "all the favorable attitudes impinging upon the concern" so that the discussion of that intangible serves for the group of intangibles (p. 845).

[24] *Kansas City S. R. Co.* v. *United States*, 231 U. S. 423, 444.

[25] *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119, 124.

[26] *Norfolk & Western Ry.* v. *United States*, 287 U. S. 134, 143.

[27] *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 236–237.

[28] *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146.

as to the "reasonableness of the Byllesby fees" and the "nature and value" of the services (I R. 300; II R. 574–575; III R. 1179–1180). Irrespective of the relevancy or materiality of such evidence, the denial of petitioner's request was not arbitrary or an abuse of discretion. *National Labor Relations Board* v. *American Potash & C. Corp.*, 98 F. 2d 488, 491–492 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Algoma Plywood & Veneer Co.*, 121 F. 2d 602, 605 (C. C. A. 7); *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. 2d 949, 955 (C. C. A. 7).

Petitioner had been formally notified of this issue by the joint staff report served on June 14, 1941 (III R. 841, 908, 941, *et seq.*). Even before that, in April, 1941, it had been apprised of the substance of the issue when it was supplied with the results of the staff audit of the Byllesby fees (III R. 1166). More than a year before that, petitioner had been first notified of the deficiencies in its reclassification and original cost studies filed in 1939, and in response thereto, on March 21, 1941, it had filed its revised studies (I R. 1–2). The hearing, after having been set to commence on August 11, 1941 (I R. 1–5), was postponed five times at petitioner's request for a total of over six months (I R. 11–15). In seeking the last postponement, counsel for petitioner wired (I R. 14–15): "Continuance to February 26 is respectfully

requested to allow time to complete preparation. We do not anticipate that hearing will require more than a week's time." When the hearing commenced on February 26, 1942, petitioner's counsel went forward without objection or reservation (I R. 105–129). The request for delay to obtain witnesses to testify with respect to the services performed by Byllesby was made in the face of the fact that petitioner's witnesses Boyle and Bosworth had testified on that subject (I R. 161–223; II R. 452–530) and that W. J. Hagenah, the president of Byllesby, who had testified on the subject in another case,[29] was present in the hearing room throughout the proceedings, without being called as a witness (III R. 1180). These facts alone are sufficient to show that there was no abuse of discretion in denying a further continuance, and that the court below was right in so finding (IV R. 1249).

In addition, as the Trial Examiner held (III R. 1180), the evidence which petitioner proposed to obtain during the continuance was irrelevant. The profits to affiliates being properly classified, *per se,* as write-ups and excluded from plant accounts under the Commission's cost system of accounts (*supra,* pp. 7–14), it was immaterial and irrelevant to the decision of that issue what

[29] *The California Oregon Power Company, et al.* (Pub. Util. Comm. of Ore.), 8 P. U. R. (N. S.) 412 (Nov. 1, 1934); II R. 470–472, 475, III R. 1088, 1067.

the "value" may have been of the services in connection with which the profits were paid, the only relevant inquiry being the cost to the affiliated company rendering the services. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 143 F. 2d 488 (C. C. A. 8), affirmed, 324 U. S. 635; cf. *Hartford Electric Light Company* v. *Federal Power Commission,* 131 F. 2d 953, 966 (C. C. A. 2), certiorari denied, 319 U. S. 741.

There being no showing that the additional evidence was material, or that there were reasonable grounds for failure to adduce it at the hearing before the Commission, the court below properly denied petitioner's motion (IV R. 1249–1250). *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F. 2d 126, 134 (C. C. A. 6), certiorari denied, 318 U. S. 761.

CONCLUSION

The decision below is correct and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

HOWARD E. WAHRENBROCK,
Assistant General Counsel,
LOUIS W. MCKERNAN,
REUBEN GOLDBERG,
Attorneys,
Federal Power Commission.

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